

2021 CAPITAL LITIGATION CONFERENCE: DELVING INTO DEFENSE EXPERTS

February 25 - 26, 2021



EXPERTS AND DIFFERENT TOPICS

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Distributed by:

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Confronting Diminished Capacity as a "Defense" to Everything



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CAPITAL LIGATION BUREAU

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Diminished Capacity Evidence

- Mental disease evidence - evidence of a mental disease a Defendant suffers at the time of the offense (no GEI)
- Capacity evidence - evidence that a mental disease renders a Defendant incapable of forming the requisite mental state

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Diminished Capacity Evidence

Not a defense that because of mental impairment or disease, Defendant was incapable of reaching the mental state required to commit a particular crime short of an insanity defense

3

Observation Evidence

Permitted

Character traits, behavioral characteristics, actions, expressions, tendency to think a certain way

Mental and emotional makeup and capabilities (as admissible character trait evidence under *Mott & Christensen*)

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Diminished Capacity v. Observation Evidence

What does this battle currently look like since 2015?

How is the defense characterizing "observation evidence" these days?

What we should look out for . . .



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STATE v. LETEVE, 237 ARIZ. 516 (2015)

Tragic series of events

Leteve sought to introduce behavioral & character trait evidence:

- Tendency to act "reflexively"
- In response to stress
- Impulsivity
- Defense proffered testimony of parents, hired mental health expert to introduce this evidence

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Permitted testimony of parents as to impulsivity and related behavior limited to time of murders

Precluded hired expert, reasoning expert only saw Leteveh after murders and concluded it was diminished capacity evidence

ERROR. Immaterial expert did not observe Leteveh at time of murder; does not need to be limited to the time of offense

- Error was harmless. *Id.* at 401

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- **ASC found general** character trait for impulsivity **admissible**

- “Acknowledged that a Defendant who can show that he has a character trait for acting without reflection presents a fact that makes it more likely that he acted impulsively **at the time of the murders.**” *Id.* at 401

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TAKEAWAY:

- **Evidence of** impulsivity, indecision, impatience, reactivity, spontaneity, emotionality **most likely admissible**
- **It appears evidence of past similar behavior may be admissible – relevance?**

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STATE V. MILLIS, 242 ARIZ. 33 (APP. 2017)

- Millis charged with intentional child abuse & first degree murder
- Defense noticed intent to introduce diagnosis of Autism; State moved to preclude; granted
- COA upheld preclusion of a Defense Expert's testimony that Defendant has Autism and suffers from Autism Spectrum Disorder as impermissible diminished capacity evidence. *Id.* at 38.

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TAKEAWAY:

- Rejected Defendant's *Christensen* argument; Autism/ASD is not observational character evidence
- COA found trial court properly precluded evidence "finding that it was offered to support a diminished capacity defense and was not character evidence." *Id.* at 39, ¶ 19
- Acknowledged *Christensen* is only applicable in the context of premeditated murder. *Id.*

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STATE V. JACOBSON, 244 ARIZ. 187 (APP. 2017)

- Expert testimony about Posttraumatic Stress Disorder (PTSD) inadmissible to show past acts of domestic abuse inflicted by victim & its impact on Defendant
- Expert testimony concerning PTSD diagnosis was inadmissible to show impulsivity or to support claim of self-defense

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TAKEAWAY:

- “Cold” expert testimony re: PTSD inadmissible as diminished capacity evidence
- “Cold” expert testimony regarding pregnancy hormone levels was irrelevant

Trend appears to be moving toward precluding DSM/Mental Illness diagnoses as inadmissible diminished capacity evidence

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But . . .

- Although a Defendant cannot present diminished-capacity evidence to negate the *mens rea* element of a first degree murder offense, a Defendant may present observational evidence about the Defendant's tendency to think in a certain way and his behavioral characteristics

Id. at 192-93



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Also PRECLUDED on Other Grounds:

- **RELEVANCE:** Claim of PTSD/pregnancy hormones found to be irrelevant under Rule 401. *Id.* at 193, ¶ 21.
- **PREJUDICE:** This evidence is also unduly prejudicial under Rule 403, Ariz. R. Evid. *Id.* at 193, ¶ 19.
- **JUROR CONFUSION:** Jurors may confuse PTSD evidence with diminished capacity which is impermissible—this is exactly the type of evidence forbidden under *Clark*. *Id.* at 193, ¶ 20, citing *Clark*, 548 U.S. at 775

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- **HEARSAY:** Defense Expert cannot be a conduit for Defendant's self-serving statements made during the evaluation regarding his military service, alleged brain injury, or his alleged PTSD symptoms. *Id.* at 192, ¶ 16
- **IMPERMISSIBLE VOUCHING:** PTSD dx. impermissibly vouched for Defendants' credibility & was inadmissible. *Id.* at 192, ¶ 16 see also *State v. Carlson*, 237 Ariz. 381 (2015).

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REMEMBER possible arguments for preclusion in addition to diminished capacity: Rules 401-403, hearsay, impermissible vouching by Defense Expert



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STATE V. MALONE, 247 ARIZ. 29 (2019)

- Procedural facts important
- Before trial, State moved to preclude Defense Expert Dr. James Sullivan's testimony:
 - "Malone's performance on neuropsychological assessment tests was 'consistent with significant and permanent diffuse brain damage'"
 - "Malone was 'more likely to have a character trait for impulsivity.' (Dr. Sullivan did not obtain an MRI scan or like evidence to bolster his assessment that Malone had brain damage)" *Id.* at 30

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- The State acknowledged *Christensen* permitted Dr. Sullivan to testify that Malone had a character trait for impulsivity
- But State argued that *Mott* precluded evidence that brain damage made the existence of this trait for impulsivity more likely
- Trial court precluded Dr. Sullivan from offering an opinion at trial regarding brain damage to bolster opinion on impulsivity. *Id.*

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At trial:

- Malone rebutted premeditation by introducing evidence suggesting he had acted impulsively
- Dr. Sullivan testified that, based on his observations and psychological tests Malone had a character trait for impulsivity

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- THE STATE DID NOT CONTEST THAT MALONE HAD A CHARACTER TRAIT FOR IMPULSIVITY BUT NEVERTHELESS MAINTAINED HE PREMEDITATED A.S.'S MURDER
- The jury agreed, found Malone guilty as charged.
- COA reversed (split decision); trial court erred precluding brain damage testimony supporting claim of impulsivity. Error harmless, affirmed. *Id.* at 30-31.

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- Both parties took this up to the ASC
- Arizona Supreme Court disagreed with COA
- Defense Expert's proffered testimony that Defendant's brain damage made it more likely that he had character trait for impulsivity was not permissible to negate *mens rea* of premeditation

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- ASC acknowledged *Mott* precluded mental disease or defect evidence short of an insanity defense as attempting to negate *mens rea*, *Id. Citing Mott*, 187 Ariz. at 540
- Defendant may use evidence of a character trait for impulsivity to cast doubt on the existence of premeditation. *Id.*, see *Christensen*, 129 Ariz. at 35

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- "Although behavioral-tendency evidence is permissible to negate *mens rea*, linking that behavior to a mental disease or defect, whether directly or under the guise of corroboration, is impermissible." *Id.* at 34

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NOTE: change in terminology:

- "‘Observation evidence’ is a slight misnomer"
- "A more accurate term for the evidence deemed admissible in *Christensen* is ‘behavioral-tendency evidence,’ which is admissible to show a character trait. See *Mott*, 187 Ariz. at 544, 931 P.2d at 1054 (describing *Christensen* as involving ‘evidence about [the Defendant’s] behavioral tendencies’); see also Ariz. R. Evid. 404(a)(1) (permitting evidence of an accused’s pertinent character trait)." *Id.* at 32

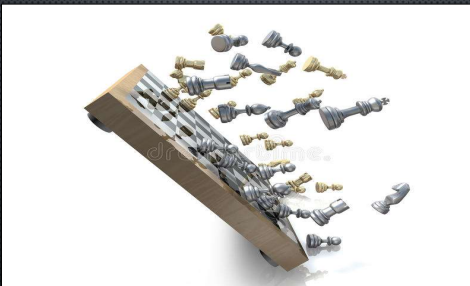
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NOTE: critical parenthetical

- "(The prosecution here did not contest that Malone has a character trait for impulsivity. Thus, the parties have not addressed whether the defense can introduce mental disease or defect evidence to corroborate behavioral-tendency evidence when the prosecution challenges the latter. We leave that issue for a future case.)" *Id.* at 34

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TOO IMPORTANT FOR A PARENTHETICAL!



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TAKEAWAY # 1

- Did the ASC *expand* observation evidence by labeling it behavioral tendency evidence? Our answer should be NO.
- “Behavioral tendency evidence” is a new label, not a different legal construct

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TAKEAWAY# 2 – PARENTHEICALS CAN BE DANGEROUS TO YOUR HEALTH

- ASC has left open the possibility that mental disease or defect evidence *could* be used to support a character trait for impulsivity if the prosecution challenges the character trait
- “WE LEAVE THAT ISSUE FOR A FUTURE CASE.”

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PRACTICAL CONSIDERATIONS:

- Do you really need to challenge impulsivity?
- What are the facts of your case?
- What is the Defense Expert's opinion?
- What is the basis of that opinion?
 - [Expert's] observations?
 - Mental health testing only?

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- During your interview/on cross: wouldn't any Defense Expert have to agree that the mere fact that a Defendant has a "character trait" for impulsivity does not mean that he or she cannot premeditate?
- Challenging impulsivity could open the door to additional expert testimony to "corroborate" the impulsivity
 - MENTAL HEALTH TESTING & RESULTS, EXTRAPOLATION FROM NORMATIVE DATA, DSM-5 DIAGNOSES. . .
- This allows defense to emphasize this evidence

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- Aren't most criminals Impulsive by nature? Is it a shock that a Defendant, a criminal, has a character trait for impulsivity?
- Given the facts of your case, will "impulsivity" as a character trait mean anything to the jury?
- Assume Defendants are not rocket scientists - wouldn't the jury most likely look at the facts of the case?

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- Malone was clearly impulsive (at some level), demonstrated by the fact that he chased his ex-girlfriend down in broad daylight, shot at her inside a car full of people, for no reason other than she didn't want to talk to him
- Prosecutor's argument; the facts, nonetheless, showed premeditation, i.e. Malone's prior threats, the length of the chase, retrieving the gun, getting out of the car, number of shots, etc.
 - REFLECTION/PREMEDITATION!

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TAKEAWAY # 3

- Admissibility of (neuro)psychological testing – as behavioral tendency evidence?
- Sullivan testified about “psychological tests”
- Not addressed by ASC

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Sullivan testified as to “Observation and psychological tests”

- What if expert was to testify only about performance on psychological tests, and had no information as to behavioral tendency evidence to bolster claims of impulsivity, etc.?
- Suggest arguing there has to be actual behavioral evidence, not just test results

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Suggestions:

- Motion to Compel Specific Disclosure
- Interview expert on whether any observations of Defendant's behavioral tendency?
- Just based on extrapolations from test data alone? *No Bueno*
- Consider moving to preclude testimony based only on dx/psychological testing

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STATE V. ZULEGER, 2020 WL 3053792

- **UNPUBLISHED OPINION**
- *Malone* in action
- Excellent synthesis of all of these cases
- Zuleger murdered his father, stabbing him to death with 2 different knives
 - Suffers from obvious mental health illness(es) but did not claim insanity
- Convicted both counts, including First Degree Murder

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- Does not preclude a Defendant charged with first degree murder from challenging premeditation by offering "behavioral-tendency evidence." *See id.* at 32, ¶ 11
- Behavioral-tendency is evidence the Defendant had a "character trait" or "behavioral tendencies" for acting "impulsively" or without reflection. *See id.* at 31-32, ¶¶ 10-11; see also Ariz. R. Evid. 404(a)(1) (Defendant may offer evidence of pertinent character trait to show action in conformity), 405 (methods of proving character trait).

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- Allowed Zuleger to question witnesses whether they had seen him act impulsively or unpredictably, and to describe some of those instances
- **PROHIBITED:** (1) testimony of family members about instances when Zuleger tore up the house, did not eat for days, and expressed concern people had planted bombs in his residence and replaced his money with fake money;

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- (2) involuntary commitment to a mental health facility in the recent past; (3) parents called law enforcement the day before to take him to a mental health facility; (4) he falsely told an officer he was on PCP; and (5) he said he had immunity and had received a pardon for the killing
- Judge declined to ask a juror question about whether Zuleger was "ever diagnosed or treated for [a] mental disorder."

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- No error precluding that specific information
- Rejected defense claim the precluded evidence was "observation evidence"
- Even if was "observation evidence" NOT *PER SE* ADMISSIBLE

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WHERE DOES THIS LEAVE US?

- IMPULSIVITY
- ACTING WITHOUT REFLECTION
- ACTING REFLEXIVELY
- UNPREDICTABILITY
- STRESS REACTION
- PANIC REACTION TO FEAR?

PERMISSIBLE OBSERVATION/BEHAVIOR/CHARACTER TRAIT EVIDENCE

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- [Low] INTELLIGENCE TESTING/ IQ SCORE
 - "INTELLECTUAL DISABILITY"
 - AUTISM, ASPERGER'S SYNDROME
 - LOWERED MENTAL CAPACITY
 - NEUROCOGNITIVE/EXECUTIVE FUNCTIONING DEFICITS
 - NEURODEVELOPMENT DISORDERS
 - TRAUMATIC BRAIN INJURY (TBI)
 - "RED OUT" & DISSOCIATIVE STATES
 - SPECIFIC MENTAL HEALTH DIAGNOSES & IMPAIRMENTS; DSM-5
 - BEHAVIOR HAVING NOTHING TO DO WITH ABILITY TO PREMEDITATE/FORM SPECIFIC INTENT [ZULEGER]
- NOT PERMISSIBLE OBSERVATION/BEHAVIOR/CHARACTER TRAIT EVIDENCE . . . FOR NOW

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HOW WILL DEFENSE DISCLOSE?

- Doubtful Defense will call it diminished capacity evidence
- Notice of Intent to [Introduce Character Trait of ...]
 - Impulsivity
 - Acting with out Reflection
 - Named Disorder (be careful)
- Simple 15.2 Notice, without information

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SUGGESTIONS ONCE PLACED ON "NOTICE"

- Simple 15.2 Notice
 - Motion to Compel Specific Disclosure
 - Written and recorded statements of witness, including [redacted] defense team notes
 - Rule 15.2(h)(1)(A)(ii)
 - *State v. Johnson*, 247 Ariz. 166, 193, ¶¶ 82-90 (2019)

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SUGGESTIONS ONCE PLACED ON "NOTICE"

- What if a mental health expert is disclosed in support of this proposed evidence?
 - Rule 15.2(c)(2)(B) & (C); report & test results OR summary of the general subject matter and opinions on which expert expected to testify

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IMPORTANT CONSIDERATIONS:

- Facts/history leading up to index offense
- Breakdown/Timeline/Chronology of events
- What occurred during crime – specific details?
- What did Defendant do afterwards?
- 404(B) Material?
 - Other acts to prove intent
 - Other crimes to show (different) behavior
 - *Rebuttal material*; may not be relevant in Case-in-Chief, but if defense opens the door...

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WHEN MIGHT "DIMINISHED CAPACITY" EVIDENCE ADMISSIBLE?

- Voluntariness issue in guilt phase (age, mental health, intelligence)
- §13-751(G)(1); First Degree Murder statutory mitigating circumstance in penalty phase:
 - "The Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution."
 - *State v. Johnson*, 247 Ariz. 166, 185-186, ¶¶ 41-44 (2019)
- Sentencing consideration in non-capital cases?

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WHAT TO CONSIDER NEXT:

- Motion *in Limine* or Motion to Preclude?
 - Proceed with caution
 - Better to ARGUE than challenge evidence?
 - Staff this issue before filing any motion
 - Identify exact argument [*Clifton* example]
 - Safe: expert can't testify as to Defendant's mental state at time of the crime
 - Behavioral evidence - up to the jury to "fill in the dots"
- *Malone* parenthetical still unresolved, don't want to make bad law

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QUESTIONS??



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